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No. 82-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF MACON,

Petitioner

v.

C. D. JOINER, *et. al.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether an activity that now is predominantly conducted by local governments is precluded from being a protected "governmental function" because it formerly was conducted by private enterprise.

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INTEREST OF THE AMICI

The *amici* are organizations which represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in the powers and responsibilities of these governments, and in legal issues affecting such powers and responsibilities. As made clear *infra*, issues of profound consequence for the authority and functions of state and local jurisdic-

tions are presented by this case. *Amici* are therefore submitting this brief to assist the Court in its consideration of the questions raised by this litigation.[1]

STATEMENT

1. Prior to 1973 the transit system of Macon, Georgia was owned by a private company, Bibb Transit Company.[2] Bibb operated the system under a franchise granted by the city. Bibb was losing money on the system, and thus notified the city that it intended to cease operations. The cessation would leave citizens without essential transportation services.

Operations did cease during the first two weeks of 1973. Thereafter, to ensure that citizens received necessary transportation, Macon first provided Bibb with a two-month operating subsidy, and then purchased and began operating the transit system. The city's system provides the only transit services in Macon.

Ninety-five percent of the persons riding the city's system are "transit captive," that is, live in a household having no automobile. As well, eighty-nine percent are black, eighty percent are middle aged, eighty percent have low incomes, and sixty-six percent are female. Twenty percent are going to and from work.

Macon's transit system operates at a loss, with the city providing operating subsidies. In addition to these subsidies, funds are received from fares, advertising revenues, and charter income. No money for operations or capital acquisitions has been received from the federal

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

[2] The facts set forth in part 1 of this statement are contained in the decision below. *Joiner* v. *City of Macon*, 699 F.2d 1060 (11th Cir. 1983).

government under the Urban Mass Transportation Act (UMTA), 49 U.S.C.A. § 1601 *et. seq.*[3]

2. In December 1979, employees of the city's transit system filed a suit claiming they are covered by wage and hour provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 207 (Supp. 1982). Macon responded that such coverage violates Tenth Amendment limitations upon Congress' power over commerce, limitations expressed in this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which also involved the FLSA's wage and hour provisions.

The district court ruled against Macon and the Court of Appeals affirmed. The Eleventh Circuit focused on whether a city's provision of mass transit services is a "traditional" governmental function under the third prong of the test this Court has used for judging whether a state or local government activity is protected by the Tenth Amendment. In its entirety, the third prong is that "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions' ". *EEOC* v. *Wyoming*, —— U.S. ——, ——; 103 S.Ct. 1054, 1061 (1983). The Court of Appeals ruled that the provision of mass transit is not a "traditional" governmental function and therefore cannot meet the third prong of the test.

The Eleventh Circuit recognized that by 1967 fifty percent of all transit riders were carried on publicly-owned systems, and that by 1978 ninety-one percent of all riders and ninety percent of all operating revenues were carried on or generated by public systems. It also recognized "the probability that private transit companies are 'doomed to extinction,' thus requiring local governments to shoulder the burden abandoned by the private sector."

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[3] Macon did receive state grants and federal revenue sharing funds for capital outlays.

699 F.2d at 1069. Nonetheless, it ruled there could be no Tenth Amendment protection because "[h]istorically, mass transit systems have been owned and operated by private companies," with "[p]ublic ownership [being] a fairly recent development." 699 F.2d at 1068.

The court explicitly followed the lead of a sister circuit—the third—which was "[u]npersuaded by the reality that mass transit systems are being taken over by municipal and public transportation authorities with increasing regularity."[4] Concomitantly, the court declined to follow a First Circuit decision[5] holding "that the maximum hour provisions of the FLSA cannot constitutionally be applied to public transit employees." 699 F.2d at 1067. As authority for its position, the Eleventh Circuit asserted reliance on this Court's decision in *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 102 S.Ct. 1349 (1982). Thus, the court below said that "[s]ignificant to the *Long Island R.R.* Court's determination that a publicly-operated commuter railroad is not a traditional governmental function is the fact that passenger transit operations . . . have historically been performed by the private sector.[6] 699 F.2d at 1067.

The court's view of the instant case was not altered by the fact that public transportation "is a necessity for a segment of the population" which is "transit captive."[7] 699 F.2d at 1069. Rather than being affected by this, the

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[4] The court followed *Kramer* v. *New Castle Area Trans. Auth.*, 677 F.2d 308 (3rd Cir. 1982), cert. den., —— U.S. ——; 103 S.Ct. 786 (1983).

[5] *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982).

[6] In *Long Island*, private companies operated fifteen of the seventeen commuter railroads existing at the time of suit. 455 U.S. at 1354, n.12.

[7] As stated earlier, 95 percent of the system's riders are "transit captive."

court said a majority of Macon's citizens "rely upon their own automobiles for transportation." 699 F.2d at 1069. And though the court stressed that acquisition by cities of mass transit systems was often accomplished by use of funds received under the UMTA, its decision was also unaltered by the fact that Macon had received no such funds.

REASONS FOR GRANTING THE WRIT

A. Introduction

The court below ruled that Macon's municipally-owned transit system was not a "traditional" governmental function because transit services formerly were provided by private enterprise. Thus, said the court, the Tenth Amendment does not protect the Macon system against application of federal wage and hour regulation. This ruling raises issues of profound national importance for mass transit and for other essential services that state and local governments have increasingly found it necessary to supply. As well, the lower court's ruling misapplies and is contrary to this Court's decision in *United Transportation Union* v. *Long Island R.R., supra.* Finally, the decision below, and similar decisions of the Third and Sixth Circuits, directly conflict with a decision of the First Circuit and with a district court decision on which the federal government is seeking a direct appeal in this Court. *San Antonio Metropolitan Transit Authority, et. al.* v. *Donovan, et. al.*, 557 F.Supp. 445 (D.C.W.D. Tex., 1983), appeals docketed, Nos. 82-1913 and 82-1951, O.T. 1982.

Because the decision below raises issues of vital importance, is contrary to a decision of this Court, and is one of a group of directly conflicting cases, this Court should grant *certiorari.* A grant is essential so that the Court may provide badly needed guidance on when an activity conducted by state and local governments is a "governmental function" eligible for protection under the Tenth Amendment.

B. This Case Presents Issues of Profound Importance

1. As stated above, prior to 1973 mass transit services in Macon were provided by a private company. Because that company was losing money, it determined to cease operations. The cessation would have left a segment of Macon's population devoid of transport services essential to their daily lives. The city thus determined to acquire and operate the transit system in order to preserve services vital to citizens.

Macon's experience is typical of the general experience with mass transit in this country. Until the 1960's mass transit was generally provided by private companies everywhere in the nation. However, these companies began experiencing serious financial difficulties because mass transit was not profitable. Thus, throughout the country local governments had to acquire and operate transit systems to preserve an essential element of the social infrastructure. For the curtailment or collapse of mass transit would have been highly detrimental to urban society and would have been especially harmful to the millions of low income individuals, elderly persons, students, and others who lack access to automobiles and must rely on public transport to conduct their daily activities.[8]

The national shift from privately-owned to publicly-owned mass transit systems proceeded with dispatch. By

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[8] In recognition that "[e]fficient and economical mass transportation is essential to the people who live in and around our urban centers," Congress enacted the Urban Mass Transportation Act of 1964 to provide funds for local governments to acquire and operate mass transit systems. H.Rep. No. 204, 88th Cong., 2d Sess., 1964-2 U.S. Code Cong. & Admin. News 2569 at 2571. Congress subsequently declared (1) that "in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service," and (2) that "immediate substantial Federal assistance is needed to enable many mass transportation systems to continue to provide vital service." *National Mass Transportation Assistance Act of 1974*, 49 USCA § 1601b(4) and b(6).

1978, publicly-owned systems accounted for 91 percent of all riders, 91 percent of total vehicle miles, 90 percent of all transit revenues and 87 percent of total transit vehicles.[9] *Kramer* v. *Newcastle Area Trans. Auth., supra*, 677 F.2d at 309; *Joiner* v. *City of Macon, supra*, 699 F.2d at 1068.

The Court of Appeals recognized the overwhelming trend toward publicly-owned systems. It was also aware that privately-owned transit systems would probably become extinct. Yet it held that publicly-owned transit systems could not qualify for Tenth Amendment protection because in past years mass transit systems had been owned by private enterprise. Nor was the court swayed by the fact that, as is also true in other urban areas, Macon's publicly-owned system is essential to an important segment of the population. It dismissed this fact with the observation that an even larger segment of Macon's population can use automobiles.

The court's ruling raises a profound legal question. For under the court's decision an activity which is predominantly conducted by governments, and is critical to the welfare of millions of their citizens, is nonetheless ineligible to be a protected "governmental function." Such a decision makes serious inroads upon the sovereign authority of state and local governments to provide for the welfare of their citizens. It will also cost these governments large amounts of money because it completely precludes crucial activities from receiving Tenth Amendment immunity against federal regulation. It is hardly self-evident that such a decision represents the true state

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[9] Approximately one-half the mass transit systems remained privately-owned, but these were the smaller systems. (Some of them even have but one vehicle.) According to statistics presented to this Court by the American Public Transit Associaiton, mass transit was publicly-owned in at least 100 of the 106 urban areas having a population exceeding 200,000. Motion To Affirm, p. 16. *Donovan* v. *San Antonio Metropolitan Transit Authority and American Public Transit Association*, 457 U.S. 1102, 102 S.Ct. 2897 (1982).

of the law. Rather, the decision raises the vital issue of whether the concept of governmental function can exclude an activity now conducted mainly by governments and essential to their citizens. This important issue plainly requires clarification by this Court.

2. As shown by the example of mass transit, state and local governments are not static. Rather, they change their activities over time, as required by the needs of their citizens. In recent decades, state and local governments have increasingly had to supply their citizens with essential services, including ones that are part of the infrastructure of the nation. Thus, in addition to providing mass transit, these governments have had to provide airports,[10] waste disposal facilities,[11] hospitals,[12] nursing homes,[13] utility services,[14] and other necessities of life. At times, the services were previously provided by private enterprise or may still be supplied by it in varying degrees. At other times, private enterprise may not have supplied the service or may have stopped doing so because of inability to make a profit. Whichever the case, state and local governments, which now provide the services or contemplate doing so, need to know the circumstances in which their activities will be "traditional governmental functions" eligible for immunity from federal regulation.

The decisions of lower courts have not provided state and local governments with the necessary guidance. For while there have been attempts to fashion tests for determining a "traditional governmental function," see *Amers-*

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[10] *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979).

[11] *Hybud Equipment Corp.* v. *City of Akron, Ohio*, 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded on other grounds*, 455 U.S. 931, 102 S.Ct. 1416 (1982).

[12] See e.g., *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, —— U.S. ——, 103 S.Ct. 104 (1983).

[13] *NLRB* v. *Highview, Inc.*, 590 F.2d 174, *vacated in part on other grounds*, 595 F.2d 339 (5th Cir. 1979).

[14] *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

bach v. *City of Cleveland, supra,* lower tribunals have taken inconsistent juridical positions[15] and reached inconsistent results, as demonstrated *infra* in regard to mass transit itself. The situation requires the guidance which only this Court can give on the question of when an activity is a protected governmental function. A grant of certiorari is necessary so the Court may determine an issue of great importance to the nation.[16]

C. The Decision Below Is Inconsistent With This Court's Opinion in Long Island R.R.

In ruling that Macon's publicly-owned transit system cannot receive Tenth Amendment immunity, the Eleventh Circuit repeatedly claimed that it was following this Court's decision in *Long Island R.R., supra.* 699 F.2d at 1067, 1068, 1069. This asserted reliance suffuses the opinion below.[17] However, the decision below misapplies

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[15] Thus, though the Sixth Circuit has ruled that airports are a traditional governmental function, *Amersbach* v. *City of Cleveland, supra,* and other courts have ruled that mass transit is *not* such a function, the First Circuit could see "no meaningful distinction" between airports and activities which included plans for mass transit. *Molina-Estrada, supra,* 680 F.2d at 846.

[16] A decision shedding light on when an activity is a traditional governmental function will likely shed light as well on what constitutes an indisputable attribute of state sovereignty. Such illumination will arise because governmental functions and attributes of sovereignty must have some overlap. Otherwise, an action could be a sovereign act but not a governmental function, a result which does not seem self-evidently correct. Illumination of attributes of sovereignty is desirable because the second prong of the test for assessing Tenth Amendment immunity requires that federal regulation address " 'an undoubted attribute of state sovereignty' ", but what constitutes such an attribute "is somewhat unclear" and the Court's cases "have had little occasion to amplify on our understanding of the concept." *EEOC* v. *Wyoming, supra,* 103 S.Ct. at 1061, n.11.

[17] Thus, after citing decisions holding the Tenth Amendment applicable to mass transit, the court said "We choose not to follow these decisions, however, in light of *United Transp. Union* v. *Long Island R.R.*" 699 F.2d at 1067. The Court then made an extensive attempt to show that the *Long Island R.R.* case and the present one

and is contrary to *Long Island.* This is true both as a factual matter and a legal one.

As a factual matter, the "historical reality" in *Long Island R.R.* was totally different than in the present case. In *Long Island,* the Court pointed out that "[a]t the time of this suit, there were 17 commuter railroads in the United States; only two of those railroads were publicly-owned and operated, both by the Metropolitan Transportation Authority." 455 U.S. at 686, n.12; 102 S.Ct. at 1354, n.12. Since only two of the seventeen commuter lines were publicly-owned and fifteen were privately-owned, it was plain that commuter railroads had "traditionally been a function of private industry, not state or local governments." 455 U.S. at 686, 102 S.Ct. at 1354. In the present case, by contrast, mass transit operations are overwhelmingly public, with publicly-owned systems accounting for 91 percent of the riders, 91 percent of the vehicle miles, 90 percent of the revenues, and 87 percent of the vehicles.[18]

As a legal matter, the court below departed from teachings set forth in *Long Island.* The *Long Island* Court said it was not "looking only to the past to determine what is 'traditional' ". 455 U.S. at 686, 102 S.Ct. at 1354. It stressed that the "emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions." *Ibid.* Rather, the purpose was to de-

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are similar because "[h]istorically, mass transit systems have been owned and operated by private companies." *Id.* at 1068. And, subsequent to its extensive attempt, the Court ruled that "[b]ased on the Supreme Court's analysis in *Long Island R.R.*, we hold that the services provided by the Macon Transit System . . . cannot be classified as traditional governmental functions." *Id.* at 1069.

[18] Another difference in the historical reality of the two cases is that railroads had been subject to comprehensive federal regulation for almost 100 years. 455 U.S. at 687, 102 S.Ct. at 1355. Mass transit, by contrast, has historically been subject primarily to state and local regulation.

termine whether a federal regulation will hinder a state "government's ability to fulfill its role in the Union," 455 U.S. at 687, 103 S.Ct. at 1355, or will "undermine the role of the states." 455 U.S. at 686, 103 S.Ct. at 1354.

In the present case, however, the court below has indeed imposed "a static historical test of state functions," a test which freezes the concept of governmental functions as of some earlier date in history. Such is the plain consequence of ruling that, even though mass transit now is predominantly provided by public bodies, it is not a protected governmental function because until the early 1960's it was largely supplied by private enterprise. The historically frozen test imposed by the court below prevents the concept of governmental function from evolving when state and local governments find it necessary to provide services which are essential to the welfare of citizens but can no longer be supplied by private enterprise. It thereby hampers the ability of state and local governments to fulfill their role in the Union. This is a misapplication of and contrary to this Court's decision in *Long Island R.R.*

D. The Decision Below Directly Conflicts With Another Court of Appeals Decision and With a District Court Decision That Is On Direct Appeal to This Court

In rendering its decision, the court below explicitly said "[w]e choose not to follow" the decision of the First Circuit in *Molina-Estrada, supra.* 699 F.2d at 1067. In *Molina*, the issue was whether the statutory powers and activities of the Puerto Rico Highway Authority constituted traditional governmental functions. 680 F.2d at 842, 843-847. The Authority provided for the building, upkeep and operation of roads, operated some parking lots, and planned to exercise the power to build a mass transit system. 680 F.2d at 842, 845. The First Circuit ruled that these powers and activities, including mass transit, constituted traditional governmental functions.

There is thus a direct conflict between the Eleventh Circuit decision below, which held that mass transit is *not* a traditional governmental function, and the First Circuit decision in *Molina-Estrada*, which ruled that it *is* such a function.[19]

There is also another pertinent conflict. The decision below is contrary to the district court decision in a case in which the federal government has filed a jurisdictional statement on direct appeal to this Court. *San Antonio Metropolitan Transit Auth., et. al.* v. *Donovan, et al., supra.* In *San Antonio* the court ruled that mass transit is a traditional governmental function protected against federal wage and hour regulation by the Tenth Amendment. The court recognized that mass transit historically had been provided by private enterprise,[20] 557 F. Supp. at 448, but pointed out that many of today's governmental functions "have at some time in the past been private functions," *id.* at 450, and ruled that "[t]o deny Tenth Amendment immunity on the ground that in the past the private sector was heavily involved in providing transit services would impose precisely the 'static historical test of state functions' that *L.I.R.R.* eschews." *Ibid.* The *San Antonio* decision is thus plainly irreconcilable with the decision below, and the federal government's direct appeal in that case further exemplifies the propriety of hearing this one, too.[21]

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[19] The same conflict also exists between *Molina-Estrada* and the decisions of the Third and Sixth Circuits in *Kramer* v. *New Castle Trans. Auth., supra,* and *Dove* v. *Chattanooga Area Regional Trans. Auth.*, 701 F.2d 50 (6th Cir. 1983). For, like the court below, which relied upon *Kramer*, the *Kramer* and *Dove* courts ruled that mass transit is not a traditional governmental function.

[20] It had done so pursuant to state and local government regulation, however, as the court explicitly made clear. 557 F. Supp. at 448. There had been no federal regulation that would be eroded by Tenth Amendment immunity. *Id.* at 448-450.

[21] A plenary hearing is desirable in both cases. For each case presents certain differing facets of the same problem. Thus, *Macon* contains judicial findings showing that an overwhelming percentage

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* in this case.

Respectfully submitted,

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of the citizens who use mass transit are dependent upon it, while in *San Antonio* the publicly-owned transit system received UMTA funds from the federal government.

If a plenary hearing is granted in only one case, the other should be retained on the docket pending the Court's plenary decision.